

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 28 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STONERIDGE AT MOUNTAIN VIEW)
HOMEOWNERS ASSOCIATION,)
an Arizona nonprofit corporation,)

Plaintiff/Appellant,)

v.)

MICHAEL R. THORNTON and)
TERA M. THORNTON, husband and wife,)

Defendants/Appellees.)

2 CA-CV 2009-0119
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV 200702443

Honorable Gilberto V. Figueroa, Judge

VACATED AND REMANDED

Maxwell & Morgan, P.C.

By Charles E. Maxwell, Brian W. Morgan,
and Elise V. Saadi

Mesa
Attorneys for Plaintiff/Appellant

V Á S Q U E Z, Judge.

¶1 Stoneridge at Mountain View Homeowners Association (the Association) appeals from the trial court's order awarding only a portion of the attorney fees it incurred in its action to collect unpaid assessments from appellees Michael and Tera Thornton (the Thorntons). For the reasons stated below, we vacate the court's order and remand with directions to enter an order awarding the Association's fees in full.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to upholding the trial court's ruling.” *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). The Thorntons owned Lot 69 in Stoneridge at Mountain View, a planned community located in Pinal County. The Declaration of Covenants, Conditions and Restrictions (CC & Rs) for Stoneridge provides that each lot owner is a member of the Association and is required to pay regular assessments for community expenses and maintenance.

¶3 In November 2007, the Association filed a lawsuit against the Thorntons to collect unpaid assessments. When the Thorntons failed to file an answer to the complaint, the Association applied for the entry of default and, after the Thorntons' default was entered, moved for entry of a default judgment “with hearing.” The Association also submitted an affidavit in support of its request for attorney fees in the sum of \$2,466. At the hearing on its motion on August 12, 2008, the Association asserted it was entitled to the full amount of its attorney fees pursuant to the CC & Rs, which provide that the Association's members “shall be liable for all costs, including attorneys' fees” incurred by the Association in collecting assessments.

¶4 Tera Thornton, appearing at the hearing *in propria persona*, acknowledged that she had read the Association’s request for fees and made no objection to the request. And, when asked by the trial court if she had any comments on the fee request, Tera responded, “I’m just hoping that we can come to an agreement and make payments.” The court entered a default judgment against the Thorntons for \$2,890.15 in unpaid assessments, \$577 in costs, and the full \$2,466 in attorney fees.

¶5 In October 2008, the Association initiated proceedings to garnish Tera’s wages. The Thorntons did not challenge the garnishment, and the trial court entered an order of continuing lien against Tera’s earnings for \$7,419.48, “[t]he amount outstanding on the underlying Judgment at the time of service of the Writ of Earnings Garnishment.” In November, the Association applied for a writ of garnishment against Michael’s wages. Michael requested a hearing, alleging the “writ amount [wa]s incorrect and [wa]s not the amount of [the] original judg[ment].” At the hearing, counsel for the Association stated that, since the original judgment was entered, the Association had incurred additional attorney fees of approximately \$4,000. The trial court noted that “the garnishment seems excessive based on the amount of the judgment,” and it ordered the Association to submit a detailed affidavit to support its request for attorney fees and costs. The Association subsequently filed an affidavit showing it had incurred post-judgment fees of \$4,937.50. The Thorntons did not file a response to the affidavit or otherwise object to the

Association's request for fees.¹ The court nonetheless set a hearing to review the fee application.

¶6 At the review hearing, the Association's counsel stated that she had "tried very hard to work with [the Thorntons] . . . to get a payment plan in place before garnishing any . . . wages," but the Thorntons had prevaricated and ultimately offered to pay only \$50 per month, an amount that was not acceptable to the Association given the size of the debt and the fact the Thorntons both were employed. She asserted the fee request therefore reflected fees incurred in attempting to negotiate a voluntary repayment plan and those ultimately expended to effect the garnishments. Counsel also contended the Association was entitled to a full award of its fees pursuant to the CC & Rs.

¶7 The trial court asked the Thorntons if they wished to say anything "with respect to the attorney's fee charges and some of the claims made by counsel that you made it more difficult." Although they asserted the Association's counsel was responsible for any delays, they acknowledged multiple conversations to try to "work out a payment arrangement," during which time the Association had deferred garnishing their wages. However, they made no objection to the post-judgment fees requested by the Association. The trial court nonetheless reviewed the fee application, disallowing some items entirely and, for others, awarding only part of the fee requested. It ultimately awarded \$592.50 of the Association's \$4,937.50 request for post-judgment fees.

¹Although, at the subsequent hearing on attorney fees, the trial court referred to a "pleading" filed by the Thorntons, this was merely a response to the court's order that they "submit a breakdown of the payments made to date," which did not address attorney fees.

Although the court opined that it had “overcompensated” the Association with respect to pre-judgment fees, it affirmed its prior award of \$2,466. This appeal followed.

Discussion

¶8 As its sole issue on appeal, the Association argues the trial court erred by not awarding the entire amount of post-judgment attorney fees it had requested pursuant to the CC & Rs. The Thorntons have not filed a responsive brief. When an appellant raises debatable issues in a civil case, we generally assume the appellee’s failure to file an answering brief to be a confession of reversible error. *McDowell Mountain Ranch Cmty. Ass’n v. Simons*, 216 Ariz. 266, ¶ 13, 165 P.3d 667, 670 (App. 2007); *State v. Greenlee County Justice Court*, 157 Ariz. 270, 271, 756 P.2d 939, 940 (App. 1988). “It is, however, our duty to examine the record to determine whether there are debatable issues.” *Air East, Inc. v. Wheatley*, 14 Ariz. App. 290, 292, 482 P.2d 899, 901 (1971).

¶9 CC & Rs are “a contract between a subdivision’s property owners as a whole and individual lot owners,” *Ahwatukee Custom Estates Mgmt. Ass’n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000), and “[a] contractual provision for attorneys’ fees will be enforced according to its terms,” *Chase Bank of Ariz. v. Acosta*, 179 Ariz. 563, 575, 880 P.2d 1109, 1121 (App. 1994). A trial court therefore generally lacks the discretion to refuse to award fees pursuant to a fee provision in CC & Rs that it otherwise may exercise when fees are requested under a statute such as A.R.S. § 12-341.01(A). *McDowell*, 216 Ariz. 266, ¶ 14, 165 P.3d at 670. When a prevailing party requests fees that are “facially reasonable” pursuant to such a provision, the opposing party “ha[s] the burden to show that they were clearly excessive. If such a

showing is not made, then the [prevailing party] is entitled to receive its full attorneys' fees." *Id.* ¶ 20.

¶10 The Thorntons had opportunities to object to the post-judgment fees both after the Association had filed its affidavit and at the review hearing. However, they neither objected nor made any showing that the fees requested, in whole or in part, were "clearly excessive."² Even in the context of "reasonable attorney fees" awarded under § 12-341.01, "[o]nce a party establishes its entitlement to fees and meets the minimum requirements in its application and affidavit for fees, the burden shifts to the party opposing the fee award to demonstrate the impropriety or unreasonableness of the requested fees." *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶ 38, 167 P.3d 1277, 1286 (App. 2007). No less can be required when the CC & Rs provide for the recovery of "all" attorney fees.

¶11 Given the lack of any objection, the Thorntons necessarily failed to carry their burden of showing that the fees were clearly excessive. The Association argues that the trial court therefore "abused its discretion by reducing the attorneys' fees on its own initiative and . . . assuming the role [of the Thorntons'] advocate . . . as opposed to the required neutral arbiter." The extent to which a trial court may review and reduce an

²The closest the Thorntons came to making an objection was their claim at the garnishment hearing that someone at the office of the Association's attorneys had told them the attorneys were "going to drag this out as long as [they] can, and [the Thorntons we]re going to be subject to more and more attorney's fees." However, in addition to otherwise being unsubstantiated and disputed by the Association's counsel, this claim was unsworn. It therefore could not support any ruling on attorney fees. *See Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 284, 947 P.2d 846, 858 (App. 1997). In any event, it was not cited by the trial court as a reason for its subsequent award of partial fees.

unopposed fee request made pursuant to a contractual provision is a debatable issue. We therefore consider the Thorntons' failure to file an answering brief to be a confession of reversible error. *See McDowell*, 216 Ariz. 266, ¶ 20, 165 P.3d at 672.

Disposition

¶12 For the reasons stated above, we vacate the trial court's order granting a partial award of fees and remand for proceedings consistent with this decision. The Association also has requested its attorney fees on appeal, pursuant to the CC & Rs. However, this appeal arises not from any objection by the Thorntons to the Association's request for post-judgment attorney fees, but rather from the court's sua sponte review of those fees. It therefore would be unreasonable to require the Thorntons to underwrite what is essentially a disputed issue between the trial court and the Association, even assuming attorney fees arising from such a dispute are a "cost[] . . . incurred . . . in collecting [assessments]" pursuant to the CC & Rs.³ *See Cobabe v. Crawford*, 780 P.2d 834, 836 n.3 (Utah App. 1989) (compiling cases where, due to "extraordinary situations," courts declined to award attorney fees despite enforceable contractual provisions). We therefore deny the Association's request for its attorney fees on appeal.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

³We also note that any consequent loss to the Association is mitigated by our decision, which awards the Association's fees below in full and thus eliminates the reductions the trial court actually made and properly could have made had the Thorntons, who throughout the proceedings were without assistance of counsel, shown the fees to be clearly excessive.

CONCURRING:

/s/ *Peter J. Eckerstrom*
PETER J. ECKERSTROM, Presiding Judge

/s/ *J. William Brammer, Jr.*
J. WILLIAM BRAMMER, JR., Judge